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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 IN RE: COUNTRYWIDE FINANCIAL  
12 CORP. MORTGAGE MARKETING AND  
SALES PRACTICES LITIGATION

13  
14 RANDALL D. BUCKLEY, an individual  
15 man; and JUNE TAYLOR, an individual  
woman, on behalf of themselves and all  
others similarly situated,

16 Plaintiffs,

17 v.

18 COUNTRYWIDE HOME LOANS, INC., a  
New York corporation; and  
19 COUNTRYWIDE FINANCIAL  
CORPORATION, a Delaware corporation,

20 Defendants.  
21  
22

CASE NO. 08md1988 DMS (LSP)  
CASE NO. 09cv0064 DMS (LSP)

**ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANTS' MOTION TO  
DISMISS**

23 This matter comes before the Court on Defendants' motion to dismiss this Class Action  
24 Complaint ("CAC"). After thoroughly reviewing the parties' briefs and the record on file herein, the  
25 Court grants in part and denies in part Defendants' motion.

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**I.****BACKGROUND**

This case is part of a multi-district litigation involving states, individuals and several business entities involved in mortgage lending across the country. Plaintiffs filed their CAC in the United States District Court for the Western District of Washington, and their CAC was transferred to this Court pursuant to an order from the Judicial Panel on Multidistrict Litigation. Before that transfer, Defendants filed the present motion to dismiss. This Court continued the hearing date on the motion, and issued a briefing schedule.

The named Plaintiffs in this class action case are Randall D. Buckley and June Taylor. Defendants are Countrywide Financial Corp. (“CFC”) and Countrywide Home Loans, Inc. (“CHL”). In general, Plaintiffs allege Defendants have engaged in predatory lending and deceptive sales tactics related to mortgage loans, including failing to disclose required information in the required manner and actively concealing and misrepresenting the terms of adjustable rate mortgages (“ARMs”). (CAC at 1.) The allegations as to the named Plaintiffs are as follows:

Randall D. Buckley

Randall Buckley purchased his home in Newcastle, Washington in 1987. (*Id.* at 17.) In January 2006, he refinanced the mortgage through Encore Credit Corporation. (*Id.*) That loan was subsequently transferred to Countrywide. (*Id.*) Pursuant to that loan, Mr. Buckley’s monthly payment of principal and interest was \$3,125. (*Id.*)

In December 2006, a representative of CHL called Mr. Buckley to congratulate him on qualifying for another loan with Countrywide that would lower his monthly payments by \$1,000. (*Id.*) A CHL representative completed Mr. Buckley’s loan application over the telephone on December 4, 2006. (*Id.*)

On December 6, 2006, Countrywide provided a truth-in-lending (“TIL”) disclosure statement to Mr. Buckley, which set forth monthly payments of \$2,243 for the first 24 months. (*Id.*) Countrywide also provided a good faith estimate (“GFE”) to Mr. Buckley, which set forth the same monthly payment “in principal and interest, and total monthly payments of \$2,388.61 including

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1 payments for taxes and insurance.” (*Id.*) Relying on these disclosures, Mr. Buckley decided to  
2 proceed with the loan. (*Id.* at 17-18.)

3 Mr. Buckley closed the loan on December 20, 2006. (*Id.* at 18.) At that time, the terms of his  
4 loan had changed dramatically. (*Id.*) The monthly payment had increased by over \$500 and the term  
5 of that payment had changed from 24 months to just six months. (*Id.*) Furthermore, after the first six  
6 months, the payment would adjust upwards every six months. (*Id.*) No Countrywide representative  
7 was present or available at the closing, and the escrow representative was unable to answer Mr.  
8 Buckley’s questions about the change in the loan terms. (*Id.*)

9 June Taylor

10 Ms. Taylor purchased her home in Renton, Washington in January 2005. (*Id.* at 19.) She  
11 obtained a mortgage with the help of Neal Whiteford, a broker at First Northwest Mortgage Corp.  
12 (*Id.*) Mr. Whiteford brokered a first and second mortgage for the purchase of the home. (*Id.*)  
13 Thereafter, Countrywide acquired First Northwest Mortgage Corp., and Mr. Whiteford became an  
14 employee of Countrywide. (*Id.*)

15 In the summer of 2006, Mr. Whiteford spoke to Ms. Taylor about refinancing her loans. (*Id.*)  
16 “He told her that a refinance with Countrywide would be advantageous because it would allow her  
17 to get rid of her unwanted second mortgage and would lower her monthly payments.” (*Id.*)

18 Plaintiffs allege Countrywide did not provide Ms. Taylor with a TIL disclosure statement or  
19 a GFE before she signed final closing documents. (*Id.*) They also allege that the final closing  
20 documents (1) misrepresented that her initial monthly payments would “fully service the mortgage[.]”  
21 (*id.* at 20), and (2) failed to disclose the interest rate “in a clear or conspicuous manner.” (*Id.*)

22 These allegations serve as the factual basis for Plaintiffs’ sole legal claim, which alleges a  
23 violation of the Washington Consumer Protection Act (“WCPA” or “CPA”), Wash. Rev. Code §  
24 19.86.010 *et seq.*

25 **II.**

26 **DISCUSSION**

27 Defendants raise three basic arguments in support of their motion to dismiss the CAC. First,  
28 they argue the individual Plaintiffs’ claims must be dismissed because the misrepresentations and non-

1 disclosures are not actionable. Second, they assert the Plaintiffs' claims are preempted. Third,  
2 Defendants contend Defendant CFC must be dismissed from this case because Plaintiffs failed to  
3 plead any specific wrongdoing on its part.

4 **A. Standard of Review**

5 Dismissal pursuant to Rule 12(b)(6) is proper only where there is no cognizable legal theory  
6 or an absence of sufficient facts alleged to support a cognizable legal theory. *Navarro v. Block*, 250  
7 F.3d 729, 732 (9th Cir. 2001) (citing *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.  
8 1988)). In deciding a 12(b)(6) motion, all material factual allegations of the complaint are accepted  
9 as true, as well as all reasonable inferences to be drawn from them. *Cahill v. Liberty Mut. Ins. Co.*,  
10 80 F.3d 336, 338 (9th Cir. 1996). However, the court need not accept all conclusory allegations as  
11 true; rather, it must "examine whether conclusory allegations follow from the description of facts as  
12 alleged by the plaintiff." *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (citation omitted).  
13 *See also Benson v. Arizona State Bd. of Dental Examiners*, 673 F.2d 272, 275-76 (9th Cir. 1982)  
14 (court need not accept conclusory legal assertions); *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir.  
15 1977) ("Conclusory allegations, unsupported by facts, [will be] rejected as insufficient to state a claim  
16 under the Civil Rights Act."); *accord Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984) ("All  
17 well-pleaded facts, as distinguished from conclusory allegations, must be taken as true."). A claim  
18 "should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in  
19 support of his claim which would entitle him to relief.'" *Perfect 10, Inc. v. Visa Intern. Service Ass'n*,  
20 494 F.3d 788, 794 (9<sup>th</sup> Cir. 2007), *cert. denied*, \_\_\_ U.S. \_\_\_, 128 S.Ct. 2871 (2008), (quoting  
21 *Rodriguez v. Panayiotou*, 314 F.3d 979, 983 (9<sup>th</sup> Cir. 2002)).

22 **B. Preemption**

23 Defendants argue Plaintiffs' claims are preempted by the Truth in Lending Act ("TILA") and  
24 the Real Estate Settlement Procedures Act ("RESPA"). Defendants also assert Plaintiff Taylor's claim  
25 is preempted by the National Bank Act ("NBA"). The Court addresses these arguments in reverse  
26 order.

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1           1.       The NBA

2           Plaintiff Taylor obtained the loan at issue in this case from Countrywide Bank, N.A. (*See* Mot.  
3 to Dismiss, Ex. A.) As a result, Defendants argue Taylor's claim is preempted by the NBA. The NBA  
4 regulations provide:

5           a national bank may make real estate loans under 12 U.S.C. 371 and § 34.3, without  
6 regard to state law limitations concerning: ...

7           (4) The terms of credit, including schedule for repayment of principal and interest,  
8 amortization of loans, balance, payments due, minimum payments, or term to maturity  
9 of the loan, including the circumstances under which a loan may be called due and  
10 payable upon the passage of time or a specified event external to the loan; ...

11           (9) Disclosure and advertising, including laws requiring specific statements,  
12 information, or other content to be included in credit application forms, credit  
13 solicitations, billing statements, credit contracts, or other credit-related documents; ...  
14 [and]

15           (12) Rates of interest on loans[.]

16           12 C.F.R. § 34.4 (a)(4), (9). Plaintiffs do not dispute that this case challenges the manner in which  
17 Defendants disclosed the rates and terms of their loans. (Pls.' Resp. to Mot. at 21.) However, they  
18 do dispute whether the NBA applies to this case since Countrywide Bank, N.A. is not a party.<sup>1</sup>

19           In response to this argument, Defendants cite *Krispin v. May Dep't Stores Co.*, 218 F.3d 919  
20 (8<sup>th</sup> Cir. 2000). In that case, the plaintiffs brought claims against a department store alleging that late  
21 fees associated with the store's credit cards violated state law. *Id.* at 921. The store removed the case  
22 to federal court on the basis of preemption by the NBA. *Id.* at 922. The Eight Circuit affirmed the  
23 district court's exercise of jurisdiction even though the bank was not a party to the case. In doing so,  
24 the court stated: "although we recognize that the NBA governs only national banks, in these  
25 circumstances we agree with the district court that it makes sense to look to the originating entity (the  
26 bank), and not the ongoing assignee (the store), in determining whether the NBA applies." *Id.* at 924.

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28           <sup>1</sup> Plaintiffs also assert the NBA "does not preempt laws of general application such as the  
Washington Consumer Protection Act." (*Id.* at 22.) However, Plaintiffs fail to cite any binding  
authority to support this assertion. Indeed, Ninth Circuit law is to the contrary. *See Rose v. Chase  
Bank USA, N.A.*, 513 F.3d 1032, 1038 (9<sup>th</sup> Cir. 2008) ("Regardless of the nature of the state law claim  
alleged, however, the proper inquiry is whether the 'legal duty that is the predicate of' Plaintiffs' state  
law claims falls within the preemptive power of the NBA or regulations promulgated thereunder.")  
Accordingly, the Court rejects this argument.

1 Plaintiffs assert the claims in this case are distinguishable from those in *Krispin*, therefore  
2 *Krispin* does not apply here. However, the nature of the claims is not a meaningful distinction. The  
3 relevant facts in each case are the same: the plaintiffs brought claims against entities that did not  
4 originate the transactions, and the originating entities were national banks. On these facts, the *Krispin*  
5 court looked to the originating entity in determining that the NBA preempted the plaintiffs' claims.  
6 That reasoning applies equally to the facts of this case, and leads to the same conclusion: Taylor's  
7 claim is preempted by the NBA because the entity that originated her loan, Countrywide Bank, N.A.,  
8 is a national bank. This holding applies even though Countrywide Bank, N.A. is not a party to this  
9 case. Accordingly, Taylor's claim is preempted by the NBA.

10 2. TILA

11 With Taylor's claim preempted, the only remaining claim belongs to Plaintiff Buckley.  
12 Defendants assert his claim is also preempted, but by TILA or RESPA, not the NBA. Like the NBA,  
13 TILA preempts certain state laws, but its preemptive effect is not as great. Unlike the NBA, TILA  
14 preempts only those laws that "are inconsistent with the provisions of this subchapter and then only  
15 to the extent of the inconsistency." 15 U.S.C. § 1610(a)(1). The regulations interpreting TILA  
16 provide: "A State law is inconsistent if it requires a creditor to make disclosures or take actions that  
17 contradict the requirements of the Federal law." 12 C.F.R. § 226.28(a)(1).

18 Defendants fail to make that showing. Instead of drawing a comparison between the disclosure  
19 requirements under the WCPA and TILA, Defendants point to differences in the statutes of limitations  
20 applicable to each law, and the remedies available thereunder. Yet, neither of these factors renders  
21 Buckley's claim inconsistent with TILA. See *Quezada v. Loan Center of California, Inc.*, No. CIV.  
22 08-177 WBS KJM, 2008 WL 5100241, at \* 5 (E.D. Cal. Nov. 26, 2008) (finding claim under  
23 California's unfair competition law ("UCL") not inconsistent with TILA even though UCL provided  
24 for longer statute of limitations and additional remedies).

25 Defendants' reliance on *Silvas v. E\*Trade Mortgage Corp.*, 514 F.3d 1001 (9<sup>th</sup> Cir. 2008), is  
26 also misplaced. In that case, the court did not decide whether a state law claim was preempted by  
27 TILA. Rather, the federal law at issue in *Silvas* was the Home Owners Loan Act, which carries a  
28 greater preemptive effect than TILA.

1 Based on the statutory language of TILA and the regulations promulgated thereunder, this  
2 Court finds Buckley's claim is not preempted by TILA. *See Williams v. First Government Mortgage*  
3 *and Investors Corp.*, 176 F.3d 497, 499-500 (D.C. Cir. 1999) (holding TILA does not preempt District  
4 of Columbia's Consumer Protection Procedures Act).

5 3. RESPA

6 The same result applies under RESPA. Like TILA, RESPA preempts only those laws that "are  
7 inconsistent with any provision of this chapter, and then only to the extent of the inconsistency." 12  
8 U.S.C. § 2616. Here, Defendants argue the WCPA is inconsistent with RESPA in that it provides a  
9 private right of action for violations of loan disclosure rules whereas RESPA does not. However,  
10 Defendants fail to cite any authority to support this argument. They also fail to explain why Buckley's  
11 entire claim should be preempted when the alleged RESPA violation is only one aspect of Defendants'  
12 alleged predatory lending and deceptive sales tactics. At this stage of the proceedings, the Court  
13 declines to find that Buckley's claim is preempted by RESPA.

14 **C. Misrepresentations and Nondisclosures**

15 Absent preemption, the Court turns to the substance of Buckley's WCPA claim. That claim  
16 alleges the final loan terms were inconsistent with Defendants' initial written disclosures, and the date  
17 on his Notice of Right to Cancel was inaccurate. Plaintiffs allege this conduct violated TILA, RESPA,  
18 Washington's Mortgage Brokers Practices Act ("MBPA"), Washington's Consumer Loan Act  
19 ("CLA"), and otherwise constituted unfair or deceptive acts or practices in violation of the WCPA.  
20 Defendants argue their initial disclosures did not violate any of the cited statutes and were not  
21 otherwise unfair or deceptive. They also assert the date on the Notice of Right to Cancel was correct,  
22 as a matter of law.

23 Plaintiffs' opposition to the motion to dismiss is noticeably silent on the issue of the Notice  
24 of Right to Cancel. Accordingly, the Court grants Defendants' motion to dismiss that aspect of  
25 Plaintiffs' claim.

26 That leaves only the terms of Buckley's loan. Plaintiffs allege "[t]he final terms of the loan  
27 were patently inconsistent with the required written disclosures made to Mr. Buckley early in the loan  
28 process." (CAC at 18.) Plaintiffs contend this inconsistency was a "bait and switch" tactic, which

1 violates TILA, RESPA, MBPA, CLA and otherwise constitutes unfair or deceptive conduct.  
2 However, “[t]he Truth in Lending Act does not provide a cause of action when a lender engages in  
3 ‘bait and switch techniques.’” *Clark v. Troy and Nichols, Inc.*, 864 F.2d 1261, 1264 (5<sup>th</sup> Cir. 1989).  
4 Plaintiffs also fail to provide any authority that “bait and switch” techniques violate RESPA or the  
5 CLA.

6 Nevertheless, “bait and switch” advertising is prohibited by the MBPA. *See* Wash. Rev. Code  
7 § 19.146.0201(7). Defendants assert Plaintiffs fail to provide any factual allegations about “how they  
8 were part of the alleged bait and switch[.]” (Reply at 7), but the Court disagrees. Plaintiffs allege  
9 Buckley received a telephone call from a CHL representative in which the representative  
10 “congratulated him on becoming qualified for lower monthly payments by refinancing a loan with  
11 Countrywide[.]” and offering “to refinance Mr. Buckley’s loan in a manner that would lower his  
12 payments by approximately \$1,000 per month.” (CAC at 17.) Based on those representations,  
13 Buckley completed an application for a refinance. (*Id.*) Defendants then provided initial disclosures  
14 consistent with those representations, only to offer a final product with much different terms. (*Id.* at  
15 17-18.) These allegations are sufficient to state a violation of the MBPA, which violation “is an unfair  
16 or deceptive act or practice and unfair method of competition in the conduct of trade or commerce in  
17 violation of” the CPA. *See* Wash. Rev. Code § 19.146.100. Accordingly, Defendants’ motion to  
18 dismiss this aspect of Plaintiffs’ claim is denied.

19 **D. Defendant Countrywide Financial Corporation**

20 Finally, Defendants move to dismiss CFC from this case. Defendants assert Plaintiffs have  
21 failed to allege any facts concerning CFC’s connection to the named Plaintiffs or its actionable  
22 conduct, either individually or jointly with CHL. However, the Court disagrees. First, Plaintiffs  
23 allege multiple theories of liability against CFC: direct, co-conspirator, agent, servant, assignee and/or  
24 joint venture. (CAC at 3.) Furthermore, Plaintiffs allege numerous and sufficient facts concerning  
25 CFC’s participation in the unfair and deceptive practices at issue in this case. Accordingly,  
26 Defendants’ motion to dismiss CFC is denied.

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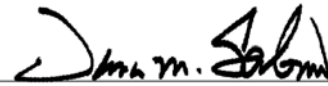
2 **III.**

3 **CONCLUSION**

4 In light of the above, Defendants' motion to dismiss is granted in part and denied in part.  
5 Specifically, the Court (1) grants the motion to dismiss Plaintiff Taylor's claim as preempted by the  
6 NBA, (2) denies the motion to dismiss Plaintiff Buckley's claim as preempted by TILA or RESPA,  
7 (3) grants the motion to dismiss Plaintiff Buckley's claim to the extent it relies on the Notice of Right  
8 to Cancel, (4) denies the motion to dismiss the remainder of Plaintiff Buckley's claim, and (5) denies  
9 the motion to dismiss Defendant CFC.

10 **IT IS SO ORDERED.**

11 DATED: March 4, 2009

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13 HON. DANA M. SABRAW  
14 United States District Judge  
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